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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.C.,

a Person Coming Under the Juvenile
Court Law.

B215323

(Los Angeles County
Super. Ct. No. YJ32936)

THE PEOPLE,

Plaintiff and Respondent,

v.

D.C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Wayne C. Denton, Commissioner. Affirmed and remanded with directions.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Mary Sanchez and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

D.C. (the minor) appeals from an order declaring him a ward of the court and ordering him home on probation after finding he had made a criminal threat. The minor contends the juvenile court failed to exercise its discretion, as required by Welfare and Institutions Code section 702,¹ to determine whether the adjudicated allegation was a felony or misdemeanor, requiring remand for the juvenile court to make that determination. The minor further contends that because the offense was not declared a felony, he should not have been ordered to provide a DNA sample.

PROCEDURAL AND FACTUAL BACKGROUND

On March 6, 2009, the People filed a section 602 petition against the minor, then 15 years old, alleging he had made a criminal threat against his mother in violation of Penal Code section 422.

According to the evidence at the adjudication/disposition hearing, on March 4, 2009, the minor argued with his mother and threw a telephone against the wall. He left the house when his mother telephoned the police. The minor returned after the police had left, but his mother had locked the front door. The minor asked for his clothes. The mother telephoned the police and told the minor he could retrieve his clothes when the police arrived. The minor began climbing through a window into the house, yelling, “Open the f----- door, bitch, or I’m going to f--- you up.” After his upper body was inside the house, the minor lunged at his mother and attempted to unlock the front door. His mother feared the minor would hurt her.

At the conclusion of the hearing, the juvenile court sustained the allegation in the petition, declared the minor a ward of the court, and ordered him into his father’s

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise designated.

custody, subject to certain terms and conditions, among them, that he provide a DNA sample.

DISCUSSION

Failure to Declare the Crime of Making a Criminal Threat a Felony or Misdemeanor

The minor contends and the People acknowledge the juvenile court failed to exercise its discretion under section 702 to determine whether the adjudicated offense was a felony or misdemeanor, requiring remand for such determination. We agree.

The crime of making a criminal threat may be either a felony or a misdemeanor. (See Pen. Code, § 422.) When, as here, a minor is found to have committed an offense that would in the case of an adult be punishable either as a felony or a misdemeanor, section 702 requires the juvenile court to declare the offense to be a misdemeanor or felony. The requirement “serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion” under the statute. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1207.) An express declaration is necessary; the juvenile court’s failure to comply with this mandate requires a remand unless the record shows the juvenile court was aware of, and exercised, its discretion to determine the offense to be a felony or a misdemeanor. (*Id.* at p. 1209.)

In this case, the minute order of the disposition hearing reflects the crime of making a criminal threat was a felony, as it was alleged in the petition. However, this factor alone does not satisfy the requirements of section 702. (*In re Manzy W., supra*, 14 Cal.4th at pp. 1207-1209.) Remand is required for the court to make an explicit finding whether the crime of making a criminal threat is a felony or misdemeanor.

DNA Sample Was Improperly Ordered

The minor also contends and the People acknowledge that in the absence of an explicit finding that his crime of making a criminal threat was a felony, he should not have been ordered to provide a DNA sample. The juvenile court ordered the minor to

provide a DNA sample pursuant to Penal Code section 296, subdivision (a)(1), which requires the collection of DNA from anyone convicted of a felony, including a juvenile whose adjudication under section 602 was based upon the commission of a felony. However, where as in this case, a minor has been adjudicated to have committed an offense that would be either a misdemeanor or felony if committed by an adult, the requirement to provide a DNA sample is not triggered until the juvenile court expressly declares the offense to be a felony. (*In re Nancy C.* (2005) 133 Cal.App.4th 508, 510, 512.) Accordingly, we agree with both parties the probation condition that the minor provide a DNA sample should be stayed pending remand. Should the juvenile court subsequently declare the offense to be a misdemeanor, it should strike its order requiring the minor to provide a DNA sample pursuant to Penal Code section 296, subdivision (a)(1), and if such sample has already been collected, the minor may seek relief pursuant to the expungement procedure provided by Penal Code section 299.

DISPOSITION

The order is affirmed. The matter is remanded for further proceedings in accordance with this opinion.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.